branches of the government had the right to nullify the congressional will as expressed in the mining laws; that "the promulgation of the order in question" was "one manifestation of a growing tendency to concentrate in the executive more power than can be traced to any specific constitutional or legislative provisions" and was "an encroachment upon the domain of Congress".

W. E. C.

MUNICIPAL CORPORATIONS: CONTROL OVER PUBLIC SERVICE COMPANIES IN THEIR USE OF THE STREETS.—It has been settled beyond question that section 19 of article 11 of the constitution, prior to its amendment in 1911,[1] constituted a direct grant from the people of the state to the types of public service companies therein enumerated of the right to use the streets of a city for the purposes authorized;[2] that the privilege, when accepted and used, became an easement in the particular streets,[3] and that under familiar principles of constitutional law, the contract formed by the acceptance of the grant cannot be impaired either by the municipality or state.[4]

But the constitutional provision above referred to did not vest the grantees with an absolute right to excavate the streets of a city. In the case of *Ex parte Keppelmann*,[5] the Supreme Court was called upon to pass on the validity of an ordinance of San Francisco regulating the excavation of streets. The ordinance provided for indemnity for damages from excavations, the registration of plans of intended excavations with the Board of Public Works, and the issuance of a certificate by them upon the approval of the plans by the city engineer. The ordinance also made it a misdemeanor to excavate in the streets without such certificate as evidence of the right to do so. The majority of the court sustained the validity of the ordinance, but a dissent was based upon the inconsistency of the majority opinion with the prior case of In re Johnson.[6]

It is believed that the principal case and In re Johnson are not in conflict. In the latter case, the ordinance, as construed by the court, attempted to vest a discretion in a city official to grant or refuse the right to enter the city. As this right was directly granted by the constitution it is clear that the right itself could not be made to depend upon the will of a city officer. There can be no doubt that a city official cannot be vested with a discretion, the exercise of which may prevent the beneficial user of a franchise.[7] As standing for such

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[1] Stats. 1911, p. 2180.
[2] People v. Stevens (1882), 62 Cal. 209.
[3] Stockton G. and E. Co. v. San Joaquin Co. (1905), 148 Cal. 313, 83 Pac. 54.
[4] New Orleans Gas Co. v. Louisiana Light Co. (1885), 115 U. S. 650.
[5] (Jan. 8, 1914), 47 Cal. Dec. 65, 138 Pac. 346. Rehearing denied Feb. 4, 1914.
[6] (1902), 137 Cal. 115, 69 Pac. 975.
[7] Madison v. Morristown Co. (1902), 63 N. J. Eq. 120, 52 Atl. 158.

a doctrine, In re Johnson is undoubtedly sound law;[8] and though some language was used in the case, which, if given a universal application, would seem to deny the right of a city to regulate the exercise of the right to excavate the streets at all, yet when confined to the facts then before the court, such language does not lay down a principle inconsistent with that adopted in Ex parte Keppelmann.

The duty of the city engineer, as the ordinance in the principal case was construed, was merely ministerial, while that of the Board to issue the certificate upon the compliance with the indemnity provisions and the regulations of the department, was mandatory.[9] That part of the ordinance which prohibited excavations without the certificate as evidence of the right is justifiable under the ordinary police power of a city. That the prevention of excavations in the streets is intimately connected with public safety, and that a city may adopt reasonable means of identifying those who possess that right, is too plain to require citation of authority.

It will be readily conceded that a municipality will not be allowed to enforce regulations which are tantamount to a denial of the grantee's right to exercise its franchises, or such as are arbitrary, capricious, unreasonable, or prohibitory in their nature or effect;[10] but it is clear, on the other hand, that the privileges granted by section 19 of article 11 as it formerly stood neither curtailed the power of a city to make reasonable police regulations, nor to direct by reasonable requirements the manner in which the streets should be used in the exercise of the franchise.[11]

S. R. S.

MUNICIPAL CORPORATIONS: FIRE ORDINANCE.—In the case of *Hood v. Melrose, Recorder of the City of Tropico,*[1] the District Court of Appeal, in the Second District, construes the power given to a city of the sixth class, under the Municipal Corporations Act, "to establish and maintain fire limits and regulate building and construction and removal of buildings within the municipality".[2] The court holds that a municipal ordinance which prohibits the erection, removal or repair of any tent, tent-house, cloth, or shake house within the municipal limits except upon permission granted by the city trustees is valid. The only serious contention of the petitioner was that the discretion lodged in the board of trustees of the city might be exercised arbitrarily, or, when exercised uniformly, might work individual hardship.

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[8] Dillon, Mun. Corp., 5th ed., § 259.

[9] See State v. Latrobe (1895), 81 Md. 222, 31 Atl. 788; National Subway Co. v. St. Louis (1898), 145 Mo. 551, 46 S. W. 981; Dillon, Mun. Corp., 5th ed., § 1273.

[10] Merced etc. Co. v. Turner (1906), 2 Cal. App. 720, 84 Pac. 239.

[11] New York v. Squires (1891), 145 U. S. 175, 179; Missouri v. Lacedale G. L. Co. (1898), 170 U. S. 78.

[1] (April 17, 1914), 18 Cal. App. Dec. 545.

[2] Mun. Corp. Bill, § 826, subd. 16.